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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MBGF PROPERTIES, Plaintiff and Respondent, v. CONCOURSE PARKING CORPORATION, Defendant and Appellant.	B207381 (Los Angeles County Super. Ct. No. BC 243641)

APPEAL from a judgment of the Superior Court of Los Angeles County, Helen I. Bendix, Judge. Affirmed.

Ezer & Williamson and Mitchel J. Ezer for Defendant and Appellant.

Law Offices of Paul A. Beck and Paul A. Beck for Plaintiff and Respondent.

* * * * * *

Appellant Concourse Parking Corporation (Concourse) and respondent MBGF Properties (MBGF), a partnership, settled their differences by agreeing to a stipulated judgment under Code of Civil Procedure section 664.6, which MBGF could enter if Concourse defaulted. Concourse did default and the trial court was presented with evidence of damages sustained by MBGF. A judgment for $927,585.64 was entered and this appeal resulted. We affirm.

FACTS

1. The Settlement

Concourse began in 1987 to lease from MBGF a parking lot servicing LAX. The business relationship between MBGF and Concourse was not harmonious; it was marred by repeated defaults on the part of Concourse. Suffice it to say that on April 6, 1999, MBGF filed an unlawful detainer action against Concourse. The current action has no connection with this unlawful detainer action. Just before this action was to go to trial, on June 25, 1999, Concourse filed for bankruptcy protection under chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 101 et seq.) (Chapter 11). Concourse was not to emerge from bankruptcy until late 2004.

There now ensued negotiations that led to a settlement agreement dated October 31, 2000. As part of the settlement, MBGF and Concourse signed a stipulation for the entry of judgment in favor of MBGF in the event of a default by Concourse. Among other things, in case of default the stipulation included provisions requiring Concourse to turn the premises (5340 West Century Boulevard, Los Angeles) over to MBGF and to pay MBGF $160,000.

Contemporaneously with the settlement agreement, Concourse and MBGF also executed a "Third Amendment" to the lease agreement. The Third Amendment and the settlement agreement referenced each other and contained identical provisions, with at least one exception, which we discuss below.

Under the settlement agreement, Concourse was to pay MBGF $160,000 in specified installments. The first installment of $30,000 was due (the "Effective Date") on the 11th day after the bankruptcy court ordered the lease "rejected" and ordered the lease to be "surrendered" to MBGF. These orders were in fact entered by the bankruptcy court on

December 18, 2000, making December 29, 2000, the Effective Date. (The settlement agreement took note of the pending bankruptcy and specified three possible courses of action vis-à-vis the bankruptcy. These were to seek dismissal of the Chapter 11 proceedings or seek approval of the settlement from the bankruptcy court or, as was actually done, have the bankruptcy court abandon the lease, which meant that the lease was excluded from the bankrupt's estate.)

Under the settlement agreement, the second and third installments of $5,000 each were to be paid respectively on the 30th and 60th day from the Effective Date.

The Third Amendment specified that the fourth installment of $20,000 was to be paid in 20 monthly subinstallments commencing on the 15th day of the third month following the Effective Date. This provision was omitted from the settlement agreement. According to a letter dated January 17, 2001, by MBGF's counsel, Paul A. Beck, to Concourse's counsel, this omission was inadvertent and simply a mistake, a fact corroborated by the circumstance that the settlement agreement also called for a payment of $160,000, and not $140,000.

A final installment of $100,000 was to be paid out under a scheme that is not necessary to discuss.

2. The Default

On January 19, 2001, MBGF filed a complaint for the entry of the stipulated judgment, for the recovery of the leased premises and for damages for breach of the lease and settlement agreements.

In a lengthy declaration under penalty of perjury dated January 22, 2001, MBGF's counsel Beck averred that Concourse defaulted on the settlement agreement on December 29, 2000, when it failed to make the first payment of $30,000 on the Effective Date. The settlement agreement called for MBGF to give a 10-day notice of the default and it gave Concourse notice of the right to cure the default. This was done by MBGF by a notice dated December 29, 2000. Concourse never cured the default.

It is undisputed that the first payment that Concourse actually made under the settlement agreement was $16,000 on January 4, 2001.

Beck's declaration went on to list the following sums as being in default:

Prorated rent of $10,967[1] for December 29, 2000, to January 14, 2001, and $548 in "option premiums" for the same period; rent of $20,000 for the period from January 15, 2001, to February 14, 2001, with a credit for $10,600 that was actually paid by Concourse on January 15, 2001; additional rent of $2,000 for the same period; and the option premium payment of $1,000 for the same period. These sums come to $23,915. Together with the $14,000 that had not been paid in the first installment ($16,000 of $30,000 had been paid on January 5, 2001), the default, according to Beck, amounted to $37,915. Considering that $5,000 was due under the settlement agreement 30 days after the Effective Date, by end of January 2001 Concourse was $42,915 in default.

Evidently, MBGF at some point filed an application for an order to show cause re the entry of a judgment. In response to that application and to Beck's declaration, Concourse filed a memorandum of law that we discuss more fully below and a declaration by Iraj Kermanshahchi, vice president and owner of 49 percent of Concourse. In relevant part, Kermanshahchi's declaration averred that Concourse had paid $16,000 on January 4, 2001, and $10,600 on January 15, 2001. According to Kermanshahchi, Concourse was also entitled to credits of $9,436 and $4,794, reflecting alleged overpayments by Concourse, for a total credit of $14,230. These sums come to $40,830 when the credits for the alleged overpayments are included and to $26,600 when these credits are disregarded.

Attached to Kermanshahchi's declaration is the copy of a letter by Kermanshahchi to an officer of MBGF, dated January 3, 2001, which somewhat confusingly refers to credits due Concourse, and states that "Concourse will pay some extra payment of $16,000 . . . dated January 3, 2001," and that the balance would be paid by January 15, 2001.

3. The February 6, 2001 Hearing

As a result of this hearing, the trial court made a number of findings that are important to this case. Principally, the court found that Concourse was in default and that Concourse did not cure the default. We discuss these findings, as well as others, in this section as we summarize this hearing.

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[1] Cents are omitted throughout.

In the legal memorandum filed prior to this hearing by Concourse on February 2, 2001, Concourse contended that MBGF should have sought relief from the bankruptcy stay before filing its action to recover the leased premises. Concourse also contended in the memorandum that the settlement agreement and the Third Amendment of the lease agreement should be rescinded. No reason is given why these agreements should be rescinded, although it is opaquely suggested that the business was not operating as profitably as had been expected.

The hearing on February 6, 2001, commenced with the court's observation that the bankruptcy court had no interest in the lease. The court went on to state that there was "no question" that Concourse was in default under the settlement agreement. Concourse's counsel, Sanford Passman, stated that the matter of default was "contested."

After this initial exchange, Passman stated that the settlement agreement should have been submitted to the bankruptcy court for approval. Beck pointed out that, at Concourse's request, MBGF had persuaded the bankruptcy court to abandon the lease and that this ended the bankruptcy court's role vis-à-vis the lease. Passman next claimed that since Concourse was still in bankruptcy, MBGF should have sought relief from the bankruptcy stay. Beck pointed out that relief from the stay is not required when proceedings involve property that is not in the bankrupt's estate.[2] After discussing this contention at some length with counsel, the court rejected Concourse's argument.

Passman then argued that the settlement agreement's provision enabling MBGF to take possession of the premises in the event of a default was unenforceable because it did not comply with the procedures required in unlawful detainer actions. This point was also discussed and also rejected by the court.

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[2] Beck stated that MBGF would not take action to collect sums due until the proceedings, now converted from a Chapter 11 to a "Chapter 7" (11 U.S.C. § 101 et al.), were concluded.

The balance of the hearing, extending over approximately 40 pages of transcript, addressed the question whether Concourse was in default. Passman made essentially two arguments.

First, he contended that Concourse had paid MBGF, as of the time of this hearing, $40,000 since January 4, 2001. (This figure included the two credits that Concourse was claiming, which total $14,230; Passman did not contest that Concourse had made only two payments of $16,000 and $10,600.)

Second. Passman contended that the court would have to determine whether there was a default based upon testimony given in an unlawful detainer action.

The court found that Concourse had made some payments, but not all the payments that were required and concluded that Concourse was in default. The court also rejected the view that the settlement agreement was unenforceable, to the extent that it gave MBGF the right of possession upon a default by Concourse. In other words, the court ruled that there would not have to be a jury trial on the question whether Concourse had defaulted.

The court gave the parties the opportunity to file briefs on the issues discussed in the hearing and deferred ruling until it had reviewed those briefs.

The briefs having been filed, the court entered a minute order on February 16, 2001.

In this minute order, the court first found that the bankruptcy court had surrendered the lease, i.e., excluded it from the bankrupt's estate. The court concluded that, in the event of a default, MBGF was entitled to possession of the premises. The minute order went on to state: "The evidence, including defendant's own admissions, demonstrate that defendant has defaulted in making the payments required under the Third Amendment to the Lease." The court found that MBGF had given notice of the default and that Concourse had not cured the default. Partial payments made by Concourse, the minute order states, did not operate to divest MBGF of the remedies it had under the settlement agreement. Finally, the court found that Concourse had produced no authorities that would show that the settlement agreement and the Third Amendment are unenforceable.

4. The Damages

In February 2001, MBGF, through its managing general partner Jay Mintz, notified Concourse that there was a new "replacement" tenant for the premises who would pay rent of $16,800 per month, which was $4,200 less than Concourse had been paying.

On February 27, 2001, the trial court ordered the premises to be restored to MBGF unless Concourse posted a bond of $371,776. Concourse did not post the bond and the replacement tenant, Thrifty Car Rental (Thrifty), took possession of the premises in early March 2001.

The trial of the issue of damages was finally set for April 27, 2005, after multiple continuances. The same day, however, Concourse filed a new Chapter 7 petition in bankruptcy court. Notice was received on January 3, 2006, that the Chapter 7 proceedings had been concluded.

The trial on damages commenced on April 18, 2006, and was spread over eight days during the following two months. Kermanshahchi testified for Concourse and Mintz testified for MBGF. Multiple exhibits were admitted into evidence, including damage calculations prepared by Mintz.

Concourse does not question in this appeal the actual amount awarded. We note briefly, however, that the period for which damages was awarded was May 2005 to February 2015, that in large part the damages were the difference between the rental paid by Thrifty and Concourse, that future damages were discounted to present value, and that the damages included attorney fees of $187,536.

DISCUSSION

1. The Trial Court Conducted an Evidentiary Hearing on the Issue of the Initial Default

Concourse contends that the trial court "summarily decided the possession issue without regard to the numerous triable issues of fact," even though Concourse "repeatedly requested that the court below conduct a trial on the merits dealing with the initial issue of its alleged default and it defenses thereto."

Concourse is mistaken. As we have shown, the trial court conducted a lengthy hearing on February 6, 2001, on the issue of the initial default. It turned out that the

operative facts were not in dispute. Those facts were that Concourse failed to make the first payment of $30,000 on the Effective Date; that Concourse never did make a payment of $30,000; that Concourse made only two payments prior to February 6, 2001, totaling $26,600; that Concourse was in arrears with the rent to the tune of $23,915; and that by February 6, 2001, the total default amounted to $42,915.

The court had before it the Kermanshahchi declaration, which attempted to vary the express terms of the Third Amendment and the settlement agreement. There was nothing in either agreement that authorized the credits totaling $14,230 that Concourse was claiming. But even if those credits are allowed, and we do not say that they should be taken into consideration, Concourse remained in default by $2,085 as of February 6, 2001. While Concourse continues to claim in this appeal that "all obligations by Concourse was [*sic*] paid" by Concourse, this simply is not true, as the undisputed facts establish.

While these uncontested figures show that Concourse was in default, it is not necessary to refer to them. Concourse's failure to pay $30,000 on December 29, 2000, and its subsequent failure to cure that default established that Concourse was in default. This was enough to invoke the provision of the settlement agreement calling for a return of the premises to MBGF.

Concourse never contested that it failed to make a payment of $30,000 on the Effective Date and that it did not cure that default. Thus, the trial court was not required to entertain the lengthy and extended arguments that it did entertain on February 6, 2001. Nonetheless, the court did so.

Concourse's claim that it was deprived of a "full hearing" is without merit. The hearing that it received was "full" by any measure and included pre- and posthearing briefing. Indeed, as we have observed, the hearing could have been limited to a showing that Concourse failed to pay $30,000 on December 29, 2000, and that it never cured that default although, considering the sums involved, the better course of action was the one taken by the trial court.

Concourse's insistence on a "full hearing" or even a jury trial is in reality an attempt to avoid the terms of its agreement with MBGF wherein the parties agreed to the summary procedures that gave MBGF the right to possession upon Concourse's default.

2. The Thrifty Lease Did Not Relieve Concourse of Its Contractual Obligations

Both the Third Amendment and the settlement agreement contained provisions authorizing MBGF, in the event of a default by Concourse, to assign the lease to a third party. In particular, the Third Amendment's provision on this subject closes with the following sentence: "The assignee shall assume the obligations of the Lease."

Relying on the foregoing sentence, Concourse contends that the assignment of the lease to Thrifty relieved Concourse of all liability for postassignments rents. Specifically, Concourse claims that it is not liable for the differential in MBGF's rental income that was calculated to be $308,104 (including interest of $59,108) for pretrial damages and $225,944 (no interest) in posttrial damages.

There are three reasons why this argument is without merit.

First. The fundamental fact is that Concourse breached its contracts with MBGF. The new lease agreement with Thrifty did not erase this fact nor did it undo the very real damages caused by the fact that the rent paid by Thrifty was significantly less than that which was to be paid by Concourse. The assignment of the lease did not operate as a release of Concourse's contractual obligation. (*Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 822.)[3] While the setting of the instant case is somewhat different from the facts of *Vallely* in that it was the landlord and not the tenant

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[3] "A lease of real property is both a conveyance of an estate in land (a leasehold) and a contract. It gives rise to two sets of rights and obligations -- those arising by virtue of the transfer of an estate in land to the tenant (privity of estate), and those existing by virtue of the parties' express agreements in the lease (privity of contract). (See generally 6 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 18.17, p. 33.) [¶] When a tenant assigns a leasehold, both aspects come into play in determining the obligations of the assignor and the assignee to the landlord. Looking first at the assignor, the transfer terminates his privity of estate with the landlord, but it does not affect privity of contract. The assignor remains liable to the landlord absent an express release." (*Vallely Investments, L.P. v. BancAmerica Commercial Corp., supra*, 88 Cal.App.4th at p. 822.)

who assigned the lease, the principle is the same, which is that a new lease does not extinguish the contractual obligations under the old lease.

In fact, it is somewhat inaccurate to characterize the Thrifty transaction as the "assignment" of a lease. It was in fact a new lease, with new terms, and a new lessee. The provisions authorizing the "assignment" of the lease were no doubt inserted out of an abundance of caution; even absent those provisions, MBGF clearly had the right -- in fact, the duty, in order to mitigate damages -- to enter into a new lease with a third party.

Second. As MBGF points out, there were multiple provisions in the Third Amendment and the settlement agreement that explicitly reserved to MBGF the right to pursue and recover from Concourse damages incurred as a result of Concourse's default.[4] The stray sentence on which Concourse seizes ("The assignee shall assume the obligations of the Lease") was not intended to operate as a release of Concourse's obligations. Such a release, which would have made no sense at all and which would conflict with other provisions of the contracts (see fn. 4 and accompanying text), would have to be express and unambiguous. There is no such release in this record.

Third. Even though the agreement between MBGF and Concourse states that the "assignee shall assume the obligations of the Lease," the fact of the matter is that Thrifty did no such thing. During oral argument, MBGF claimed that Thrifty assumed the obligation of paying the rent that Concourse was required to pay, along with the other obligations of the lease. But there is no evidence whatever that Thrifty committed such a commercially bizarre act. For one, if it had, MBGF would hardly have entered into a new lease agreement with Thrifty that called for a significantly lesser rental. It is of course also true that MBGF and Concourse could under no conceivable theory bind a nonsignatory to their agreement to observe the provisions of that agreement.

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[4] "[T]he [stipulated] Judgment shall not be exclusive of and shall not preclude MBGF's right to recover any additional unpaid rents and/or other alleged damages for defaults under the Lease in a separate action." (Settlement agreement, ¶ 5.(b).)

In sum, whatever the reasons were for the provision that the assignee was to "assume the obligations of the Lease," and that may have been to give MBGF ready access to the premises in case of default, this phrase is of no legally operative significance either in terms of relieving Concourse of the consequences of its default or of imposing a burden it did not want on Thrifty.

We find particularly unconvincing citations to testimony by MBGF managing partner Mintz in which he stated that the Thrifty lease was an assignment of Concourse's lease. Legal conclusions by a lay witness are very thin reeds to lean on.

Finally, the case cited by Concourse, *Douglas v. Schindler* (1930) 209 Cal. 616, 620, actually recognizes that, while an assignment of a lease severs the privity of estate, it does not sever privity of contract.

3. Damages Were Not Limited to $144,000

Concourse contends that damages must be limited to $144,000 because the complaint only sought damages of only $167,916. Concourse relies on relatively dated authorities (e.g., *Meisner v. McIntosh* (1928) 205 Cal. 11; *Singleton v. Perry* (1955) 45 Cal.2d 489), which held that when the complaint seeks specific amounts of general and special damages, it is error to award a greater sum.

In the first place, Concourse is mistaken that the complaint only sought damages in the amount of $167,916. In addition to this sum, the complaint also sought an "award of consequential damages in an amount subject to proof." As we have already noted, the settlement agreement and the Third Amendment both contained provisions reserving MBGF's right to pursue and recover from Concourse damages incurred as a result of Concourse's default and this prayer is congruent with these provisions.

Finally, we think the better and more modern rule is that in contested cases the plaintiff may recover more than was demanded when there is no surprise to the defendant. (See generally 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 497, pp. 633-634.)

Concourse also contends that under the settlement agreement MBGF was limited to recovering $160,000 and that because Concourse did pay $16,000 under the settlement agreement, the award must be capped at $144,000. This ignores the plain text of the

settlement agreement, which states that MBGF may recover any unpaid portion of $160,000 "plus any additional amounts as may then be due under the Lease for rent and/or other obligations." This is repeated in the very next paragraph, which states that such additional sums may be recovered in a "separate action." We think it is plain that any such "separate action," even if filed separately, would have been consolidated for all purposes with the action on the stipulated judgment, which would have rendered a separate filing ineffectual. As MBGF explained during oral argument, the "separate action" provision was inserted to underline that MBGF could recover consequential damages, which is precisely what MBGF did. Thus, if an error of form was committed in not requiring MBGF to file a separate action (in addition to the action on the stipulated judgment) -- which would inevitably have been consolidated with the existing action -- the error was in no sense prejudicial.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.